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No. 77-1062

In the Supreme Court of the United States

OCTOBER TERM, 1977

MAXWELL DARKS AND MARVIN OLIVO, PETITIONERS

v.

TRANSOK PIPELINE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The United States will discuss the following question:

Whether the Act of March 3, 1901, 31 Stat. 1084, 25 U.S.C. 357, gives the United States district courts jurisdiction over condemnation proceedings brought under state law against allotted lands of the Five Civilized Tribes of Oklahoma held subject to restrictions on alienation, where such allotments are held by restricted heirs and devisees of the original allottees.[1]

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[1]The United States was originally named a party defendant in this condemnation action brought by Transok Pipeline Company. The United States stipulated to a consent judgment of just compensation on behalf of the restricted Indian land-owners, and the United States was thereafter a party in the court of appeals to the appeal by one of those restricted Indians, Agnes Lucas, now Wesley, from the district

STATEMENT

Respondent, Transok Pipeline Company, obtained an order from the Oklahoma Corporation Commission permitting the company to condemn an easement to an underground formation for the storage of natural gas. Respondent then commenced this action in the United States District Court for the Eastern District of Oklahoma, seeking to condemn an easement in approximately 720 acres of allotted lands in Hughes County, Oklahoma, and naming as parties defendant all owners of interests in the lands, as well as the United States. Respondent alleged that federal jurisdiction over the case was conferred by 25 U.S.C. 357[2] because a number of the

court's denial of her motion to set aside the consent judgment. See note 3, *infra*. That appeal was consolidated in the court of appeals with the appeal by non-Indians Darks and Olivo, to which the United States was not a party.

Agnes Lucas, now Wesley, has not filed a petition for certiorari in this Court, but has filed a brief in support of the petition filed by Darks and Olivo. Inasmuch as the judgment is not final with regard to the United States and all the restricted Indian owners, including Wesley, the United States has no direct interest in the outcome of this petition. However, to the extent that petitioners challenge the statutory jurisdiction of the federal court over the condemnation proceedings, the United States is interested in the proper resolution of that issue. Since the United States was a party to the consolidated proceeding in the court of appeals, it would appear that the United States is a party here by virtue of this Court's Rule 21(4). If that is not the case, however, the United States requests that this Memorandum be considered as a Memorandum for the United States as Amicus Curiae.

[2]That statute provides:

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

interests in the condemned tracts were held by restricted heirs of Creek Indian allottees. Pendent jurisdiction was asserted over the non-Indians, including petitioners, who held interests in the condemned tracts (Pet. App. B-82).

Pursuant to Oklahoma law, the district court appointed commissioners to assess just compensation for the interests taken (Pet. App. B-12). After the commissioners' report was filed, the United States, on behalf of the restricted Indian owners, stipulated to just compensation in approximately the amounts awarded by the commissioners (Pet. App. B-58, B-82). The district court granted judgment and entered an order of distribution for the restricted defendants (Pet. App. B-56).[3]

Petitioners, Maxwell Darks and Marvin Olivo, who are not Indians and whose interests in the condemned land were unrestricted, demanded and received a jury trial on the issue of just compensation for their interests. After one award had been set aside and a new trial ordered (Pet. App. B-83 to B-84), petitioners were awarded lower

[3]After the final judgment was rendered in the district court, four restricted owners retained private counsel and filed a motion to set aside the consent judgment of just compensation. The motion alleged that the district court lacked jurisdiction because (1) the Secretary of the Interior was not made a party, (2) the United States Attorney was not authorized to represent the restricted defendants, (3) condemnation of an underground interest in allotted land is not permitted by the federal statutes, and (4) the order of the Oklahoma Corporation Commission was not approved by the Secretary of the Interior before condemnation proceedings were commenced. See Brief of Agnes Lucas, now Wesley, in Support of Petition, B-8 to B-9. The district court denied the motion (*ibid.*) and one of the restricted Indians, Agnes Lucas, now Wesley, appealed to the Court of Appeals for the Tenth Circuit. The court of appeals affirmed (Pet. App. B-85 to B-87). Agnes Lucas, now Wesley, has not filed a petition for a writ of certiorari; she has filed a brief in support of the present petition filed by unrestricted non-Indians.

compensation at the second trial (Pet. App. B-84). On appeal, they contended that the federal court lacked jurisdiction over the condemnation proceeding and that, in any event, it improperly exercised pendent jurisdiction over the interests of the unrestricted owners; they also raised a number of issues concerning Oklahoma state condemnation law and the procedures followed in the district court.

The court of appeals affirmed. Finding that the district court had exclusive jurisdiction under 25 U.S.C. 357 over the interests of the restricted Indian owners (Pet. App. B-85), the court approved the exercise of pendent jurisdiction over petitioners (Pet. App. B-87 to B-91). Noting that the federal claims were "substantial" (Pet. App. B-90) and that the case had already required four years and two jury trials, the court concluded that "[i]t would be a shocking waste of time and money now to require this cause to be relitigated in the state court" (*id.* at B-91).

Although the petition for a writ of certiorari raises numerous issues, the United States primarily will address one: whether 25 U.S.C. 357 confers jurisdiction on the United States district courts over condemnation proceedings against allotted lands held by restricted Indian heirs of an allottee of the Five Civilized Tribes of Oklahoma. The remaining issues presented by the petition, including the propriety of exercising pendent jurisdiction over petitioners, do not affect the interests of the United States.

DISCUSSION

The decision of the court of appeals is correct and does not warrant further review.

The Act of March 3, 1901, 31 Stat. 1084, 25 U.S.C. 357, provides that lands allotted in severalty to Indians may be condemned for any public purpose under state law.[4]

[4]See note 2, *supra*.

Although the statute itself does not specify the courts in which the condemnation suits may be brought, this Court in *Minnesota* v. *United States*, 305 U.S. 382, made it clear that the jurisdiction of federal courts over Section 357 suits is exclusive. Holding that "[t]he United States is an indispensable party defendant to the condemnation proceedings" (*id.* at 386), the Court stated: "There are persuasive reasons why [Section 357] should not be construed as authorizing suit in a state court. It relates to Indian lands under trust allotments—a subject within the exclusive control of the federal government. The judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts" (*id.* at 389; footnote omitted). The Tenth Circuit, following this decision, has recognized that federal courts have exclusive jurisdiction over condemnation proceedings against lands allotted to members of the Five Civilized Tribes of Oklahoma. *Town of Okemah, Okl.* v. *United States*, 140 F. 2d 963.

Those decisions are controlling here. Although petitioners suggest (Pet. 5, 12, 37) that federal jurisdiction is exclusive only with regard to original allottees, and not with regard to heirs and devisees holding subject to restrictions on alienation, that contention is unsupported and makes little sense. "A proceeding against property in which the United States has an interest is a suit against the United States," *Minnesota* v. *United States, supra*, 305 U.S. at 386, and the United States is an indispensable party to such suits whether it holds the fee in trust for Indian allottees or has issued a patent subject to continuing restrictions on alienation. See *id.* at 386 n. 1. The interest of the United States does not diminish or terminate because the beneficiary of its protection is not the original allottee but an heir or devisee. Thus, as the court of appeals held (Pet. App. B-87), the district court

in this case properly exercised jurisdiction over the proceedings involving restricted heirs and devisees of original allottees.[5]

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[5]The brief of Agnes Lucas, now Wesley, in support of the present petition raises issues subsidiary to the jurisdictional issue raised in the petition. The Act of April 12, 1926, 44 Stat. 239, as amended, Act of August 4, 1947, 61 Stat. 732, provides special procedures for suits in Oklahoma state courts involving title to lands allotted to members of the Five Civilized Tribes. These procedures include service of notice on an official of the United States Department of the Interior and representation of restricted Indians by attorneys employed by the Department of the Interior. This condemnation proceeding, however, was properly brought pursuant to 25 U.S.C. 357, not under the provisions of the Act of April 12, 1926. See *Town of Okemah, Okl.* v. *United States, supra,* 140 F. 2d at 965-966. The United States, not the Secretary of the Interior, was an indispensable party, and was properly served. Attorneys employed by the Department of the Interior are not authorized to represent the United States or restricted Indians in proceedings brought pursuant to 25 U.S.C. 357. The Department of Justice has that responsibility. 28 U.S.C. 516; 25 U.S.C. 175.

Wesley also asserts that the Act of May 27, 1908, 35 Stat. 312, permitting condemnation of easements "over" lands allotted in severalty, carries with it a negative pregnant that prevents condemnation of an underground formation in allotted lands. There is no basis for this construction, which would produce what the court of appeals called a "ridiculous result" (Pet. App. B-87). Use of the term "over" represents only a shorthand description of the most common easements; it provides no implication to bar condemnation of an interest in land otherwise permitted by 25 U.S.C. 357.

Finally, relying on the language of Section 11 of the Act of August 4, 1947, 61 Stat. 734, Wesley claims the condemnation proceeding were void *ab initio* because the order of the Oklahoma Corporation Commission was not approved by the Secretary of the Interior. Section 11 requires that orders of the Corporation Commission, issued pursuant to the Oklahoma oil and gas conservation laws, 52 Okla. Stat. 81-287, be approved by the Secretary of the Interior to become effective over allotted land. The order of the Corporation Commission permitting condemnation in this case was not issued pursuant to the oil and gas conservation laws, and the court of appeals correctly found the statute inapplicable (Pet. App. B-86). Further review of this minor point of Oklahoma Indian law is not needed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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